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No. 89-1959

In The

Supreme Court of the United States

October Term, 1989

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO AND CHARLES J. HUTTINGER,

Petitioners,

v.

FRANK LANDRY, ET AL,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

As recharacterized by the airline pilots, the questions presented by ALPA are as follows:

1. WHERE THERE IS NO RATIFIED AGREEMENT, AND THE COLLECTIVE BARGAINING PROCESS PROMISES THE RIGHT OF RATIFICATION, BUT THEN THE EMPLOYER AND UNION REPRESENTATIVE MISREPRESENT TO THE EMPLOYEES THAT THEY HAVE NO CHOICE BUT TO ACCEPT TERMINATION, ARE THE ACTS OF MAIL FRAUD, WIRE FRAUD AND BREACHES OF FIDUCIARY DUTIES OF THE EMPLOYER AND UNION SUBJECT TO RICO, ERISA AND BREACHES OF DUTY OF FAIR REPRESENTATION ("DFR") ACTIONS?

2. ARE THERE GENUINE ISSUES OF MATERIAL FACT REQUIRING TRIAL ON THE MERITS WHERE NUMEROUS PREDICATE ACTS HAVE BEEN SHOWN IN THIS AND SIMILARLY SITUATED PILOTS' CLAIMS AGAINST ALPA?

3. WHETHER THE LAW BETWEEN THE PARTIES – THE CONTRACT – ESTABLISHING AN EFFECTIVE DATE FOR THE ERISA PLAN NEED BE HONORED BY THE PARTIES AND THE COURT IN ITS IMPOSITION OF FIDUCIARY OBLIGATIONS ON THE PLAN FIDUCIARIES?

4. APPLICATION OF STATE COMMON LAW TO MATTERS RELATED TO UNION RETIREMENT PLANS.

LIST OF PARTIES TO THE PROCEEDINGS

The Air Line Pilots Association, International. AFL-CIO and Charles J. Huttinger were defendants in the district court, appellees in the court of appeals and are petitioners in this Court.

TACA International Airlines, S.A. was a defendant in the district court, an appellee in court of appeals and is a respondent in this Court.

Fringe Benefit Administrators, Ltd. was a defendant in the district court, and intervenor in the court of appeals and is a respondent in this Court.

The plaintiffs in the district court, appellants in the court of appeals, cross-petitioners and respondents in this Court, are: Frank Landry, Jules Corona, Charles South, Robert A. Massa, Don Johnson, T.Q. Howard, the Succession and Beneficiaries of Joe Hass, Walter Keller, Don Jenkins and his former wife, Zeda Jenkins, Emile Cerisier, and M. Letona. The following were plaintiffs in the district court but were not appellants in the court of appeals, and are respondents in this Court: Thomas Brignac, Robert Lukenbell, Bert Haffner, and Gary Zriek.

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The United States Court of Appeals for the Fifth Circuit issued in the matter of *Frank Landry, et al v. Air Line Pilots Association International AFL-CIO, Taca International Airlines, S.A. and Charles J. Huttinger,* No. 88-3363, its opinion on January 31, 1990 and on rehearing on April 27, 1990. These opinions have previously been reproduced and annexed as items in the appendix to the Original Petition for a Writ of Certiorari filed in this matter by Air Line Pilots Association ("ALPA") and Charles J. Huttinger ("Huttinger"). See App. A[1], App. H and App. I.

[1] "App.___" refers to the appendix annexed to the Original Petition for a Writ of Certiorari filed by ALPA and Huttinger.

(Continued on following page)

ALPA and Huttinger filed the original petition for a writ in this matter seeking to have reviewed the adverse decision of the Fifth Circuit relative to the airline pilots claims under The Racketeer Influenced and Corrupt Organization Act ("RICO")[2] and Employee Retirement Income Security Act ("ERISA")[3]

JURISDICTION

The jurisdiction of the Court has been invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following statutes have been annexed as appendix material:

AA. 29 U.S.C. § 152(2) and (3).

BB. 18 U.S.C. § 1961

CC. 29 U.S.C. § 1144(d)

(Continued from previous page)

"R___" refers to the page number of the record on appeal to the Federal Fifth Circuit Court of Appeals.

[2] 18 U.S.C. § 1961-1968.

[3] 29 U.S.C. § 1001 et seq.

STATEMENT OF THE CASE

The airline pilots brought this suit against TACA and ALPA alleging that ALPA violated their duty of fair representation, TACA violated the collective bargaining agreement and both violated RICO along with Charles J. Huttinger. They also alleged that TACA, ALPA and FBA breached their fiduciary duties under ERISA in the implementation and Administration of the Pilots retirement plan.

THE FACTS

The history necessary to understand the illicit motivation of the defendants in this case dates back to at least the early 1960's. The plaintiffs are former pilots employed by TACA Airlines, and represented by their union, ALPA. Pursuant to a Letter of Agreement dated February 24, 1982, which supplemented and modified the existing collective bargaining agreement, ALPA and TACA purportedly agreed to establish a retirement plan for TACA pilots. In addition, TACA agreed to make monthly contributions commencing March 31, 1982, into a trust account in an institution designated by ALPA's bargaining representative, Charles Huttinger, also a TACA pilot.

In 1983, while negotiating a collective bargaining agreement, TACA tried to breach its existing agreement, withdrew its recognition of ALPA, and impose new working conditions on its pilots. Only a court ordered injunction prevented TACA from doing so. *See Air Line Pilots Association v. TACA International Airlines, S.A.*, 748 F.2d 965 (5th Cir. 1984) *cert. denied*, 471 U.S. 1100 (1985).

TACA for years sought to move its base of operations from New Orleans to El Salvador, through whatever means, legal or illegal, available. Some sixteen years ago, the Fifth Circuit Court of Appeals affirmed a determination that TACA was acting in bad faith in order to undermine collective bargaining. *Ruby v. TACA International Airlines, S.A.*, 439 F.2d 1359 (5th Cir. 1971). In the Spring of 1985 ALPA was faced with threats of multi-million dollar litigation from TACA, for ALPA directed labor sabotage of TACA's equipment. In order to meet TACA's threats and quickly settle the negotiations (no matter how disfavorable to the pilots) Huttinger conspired with the ALPA election board to have an election thrown out on a procedural irregularity in voting. On July 15, 1985 a new election was certified, and this time Huttinger was installed as the new Captain Representative. Nine days later Huttinger negotiated the Pilots Agreement.

Huttinger (who due to medical problems could not fly) had lost his status to negotiate, to vote, to represent the union, and was to be automatically severed from the employment of TACA after five years of sick status, all in accordance with the 1980 contract. To avoid loss of seniority benefits, and the lump sum payments he could receive, Huttinger refused to negotiate for ALPA unless all of the foregoing was restored to him each month, before negotiations began. TACA agreed to make these alleged payments to Huttinger to induce ALPA to negotiate. The union membership was unaware of this.

On July 1, 1985, the pilots received a telegram from ALPA, which restates accusations that some pilots are intentionally sabotaging airline equipment. TACA threats to prosecute and to institute civil suit followed and were

only dropped after Huttinger agreed to TACA's terms. Because, according to ALPA's president, ALPA was in no position to afford protracted litigation.

On July 3, 1985, Charles Huttinger writes the pilots, informing them that "TACA's despicable intentions are clear", TACA is "determined to destroy ALPA at TACA, escape U.S. laws, and move to [El] Salvador". Negotiations had completely broken down and would not resume for another thirty (30) days.

Huttinger describes TACA's proposal to cease contributions to the pension plan as illegal, unfair, and ridiculous. "Regardless of the outcome of these negotiations, TACA must contribute to the plan." The plan "should not be the subject of these negotiations."

On July 24, 1985, the pilots are informed by Huttinger that the association has reached an agreement with TACA. A copy of the agreement is to be sent to them shortly. (No details are provided) The tentative agreement is "(subject to ratification)". Approximately a week later (August 3, 1985), the pilots are informed by TACA that they have twelve (12) days to quit and receive severance and retirement benefits, or stay on and move to El Salvador. The pilots must decide which option they choose. If they make no decision, or protest, then they lose severance pay and other benefits and they lose the right to continue employment. No mention is made of ratification.

The July 24, 1985 "Pilots' Agreement" superseded the 1980 collective bargaining agreement, and provided that ALPA would not hinder or oppose TACA's relocation outside the United States. The agreement forced the pilots

to accept termination and retirement unless they chose to move themselves to El Salvador.

TACA's intentions were obvious. It only wanted the senior experienced American captains to stay on long enough to help keep the airline running. Once the cheaper paid Salvadorian pilots gained enough experience to be promoted as captains, the American captains would be expendable.

Although the permanent contract made a token offer to keep all pilots on, it was in fact not even that. It was a material, intentional misrepresentation of fact. Fredrico Bloch, TACA's vice-president, informed one co-pilot, Walter Keller, that TACA was not interested in keeping any North American co-pilots.

Therefore, TACA not only misrepresented its desire to employ all pilots in the August 3, 1985 letter, it also misrepresented the same stated desire to employ all pilots in the July 24, 1985 bargaining agreement.

The move up to larger aircraft had the base not relocated, along with yearly increases in seniority, meant that many pilots were anticipating $120,000 to $200,000 salaries, plus benefits, prior to mandatory retirement at age 60. Instead they were forced by the fraudulent acts of ALPA, TACA and Huttinger into accepting one time lump sum severance pay offs ranging from about $16,000 to $39,000, and nonexistent retirement pensions.

Working under too short a time period to make an informed decision, the pilots reluctantly agreed to accept mediocre severance benefits, assuming that they had the substantial portion of their retirement plan available. In

early 1986, when no benefits were forthcoming, several pilots tried contacting ALPA and Huttinger. The pilots were told that because TACA ceased its contributions in July 1985, the plan automatically terminated and their retirement benefits were unavailable. To date, the pilots have received no funds from the retirement system. Despite repeated requests, Charles Huttinger refused to give out any information. As it turns out, one pilot is receiving retirement benefits – Charles Huttinger.[4] It is believed that Huttinger began receiving benefits from the fund in November of 1985, two months after the plan had terminated.

Both Huttinger and TACA claimed they were making every effort to completely document the plan pursuant to the Letter of Agreement dated February 24, 1982. In fact, neither TACA, ALPA nor Huttinger made any effort to document the trust agreement as an ERISA Plan. They only moved forward in April 1985, when this Court rejected TACA's effort to unilaterally move its base and abrogate the collective bargaining agreement by denying TACA's writ application, effectively sustaining Judge Feldman's injunction.

The pension plan was created with a fraudulent eye toward quickly terminating it. Documented in July, 1985 with a retroactive establishment date of February 1, 1982, but then immediately made the object of implicit termination by the July 24, 1985, Pilots' Agreement (a fact

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[4] One other pilot, R.B. Hall, is receiving benefits. He retired in June of 1982, and applied long before the July, 1985 agreement was executed.

unknown to the airline pilots), this plan served only one pilot – Huttinger. Obviously, as head of the retirement committee Huttinger was in a position of control. Huttinger was treated as vested in the plan although his status was contractually terminated.

Required notices of termination of the plan upon cessation of contributions by TACA were not given by ALPA, the plan trustee, FBA, the plan administrator and mandatory fiduciary, or TACA, the employer.

Huttinger moved quickly to protect himself. In return for TACA's monthly restoration of Huttinger to the Active Seniority List, his hospital benefits and sick pay, Huttinger negotiated a quick agreement substantially favorable to TACA. TACA was relieved of its heretofore "non-negotiable" obligation to continue funding the plan. By keeping the other pilots in the dark, and applying for benefits timely, Huttinger could assure himself of getting paid. He quickly filed for retirement while he, ALPA, TACA and the FBA intentionally neglected their duty to notify the pilots of the consequences of the termination of TACA contributions to the plan under the proposed Pilots' Agreement. ALPA, the plan trustee, instructed FBA to pay Huttinger and he began to collect retirement pay at age 56 while older men were being deprived of their jobs and to this date their hard earned retirement pay.

PROCEEDINGS BELOW

A. United States District Court for the Eastern District of Louisiana, New Orleans Division

Only July 23, 1986, (R. 1) the plaintiffs filed a complaint against the Airline Pilots Association (ALPA), Fringe Benefits Administrators, Ltd. (FBA) and TACA International Airlines, S.A (TACA) for violations of the Railway Labor Act (RLA) 45 U.S.C. 151, et seq., the National Labor Relations Act (NLRA), 29 U.S.C. 1001-1461 (ERISA) and La. C.C. Art. 2315, including claims of fraud and collusion by defendants requesting damages and a declaratory judgment.

FBA filed an answer on October 22, 1986, (R. 261). ALPA and TACA filed motions to dismiss. On January 13, 1987, (R. 383-386) the pilots noticed the depositions of Charles Huttinger and First National Bank, eventually postponed at the request of defendants. On February 10, 1987, (R. 408) the pilots filed motions to transfer and consolidate this matter in the injunction proceeding, previously rendered by Judge Feldman. The defendants objected. On March 27, 1987 the pilots' motion to transfer was denied. On March 11, 1987, (R. 464) the pilots filed a motion to amend the complaint adding a second count based on RICO violations and adding Charles Huttinger as a defendant. Over oppositions of ALPA and TACA, the amended complaint was ordered filed on April 6, 1987, (R. 492)

In May, ALPA, TACA and Huttinger (R. 610) filed motions to dismiss the new complaint. The court, (R. 758) denied motions to dismiss without prejudice and ordered the pilots to file a RICO case statement, which was filed

on August 25, 1987 (R. 764). November 18, 1987, (R. 1007) the defendants moved for protective orders to quash depositions of TACA, Huttinger and FBA which the pilots had noticed for October. On December 11, 1987, (R. 1104) the court granted the protective order.

On December 14, 1987, (R. 1108) the pilots filed a motion for the court to reconsider the application of tolling principles to the dismissal of their DFR claims. December 23, 1987, (R. 1117) the court denied a request by the pilots to file supplemental brief in support of motion to reconsider. On February 29, 1988 the court denied the pilots' motion for reconsideration and ordered the pilots to respond to defendants' request for sanctions. On March 17, 1988 the court rendered reasons dismissing the pilots' new claims against TACA, ALPA and Huttinger. On April 28, 1988 the court entered a Rule 54(b) judgment dismissing ALPA and TACA, and on May 4, 1988, one dismissing Huttinger.

B. Fifth Circuit Court of Appeals

The Fifth Circuit Court of Appeals affirmed in part, reversed in part and remanded. The Court of Appeals held that a six month statute of limitations barred the labor law claims for breaches of duty of fair representation. This question has been presented to this Court by the TACA Pilots in a separate Cross Petition for Writ of Certiorari.

As to the ERISA and RICO claims previously dismissed by the District Court, the Court of Appeals found there were questions of fact regarding the fiduciary status of the defendants which precluded summary judgment

on the ERISA claim. And, it likewise found genuine issues of material fact precluding summary judgment on the RICO claims as to ALPA and Huttinger. The Court of Appeals found that ALPA was a RICO enterprise and the existence of genuine issues of material fact regarding the following:

1. Whether ALPA and Huttinger should be treated as RICO persons and made to respond as RICO defendants;

2. Whether there were sufficient acts of mail and wire fraud to consider them as predicate acts under RICO and a violation of 18 U.S.C. § 664;

3. The legal existence of a pattern of racketeering activity; and,

4. If ALPA should be treated as an enterprise for RICO purposes.

These issues were remanded to the trial Court for proceedings not inconsistent with the Court's opinion.

Regarding discovery required in this case the Court of Appeals affirmed the trial court restriction on discovery during its consideration of the motions for summary judgment, but pointed out that discovery should proceed on remand.

Pursuant to the ALPA and Huttinger petitions for rehearing, the Court of Appeals held "that there was a genuine issue of material fact as to whether (i) the retirement plan was in effect on February 1, 1982 and (ii) Huttinger had a fiduciary duty to disclose information about the plan when asked." App. H 104a, (slip op. at 3889).

The Court of Appeals further found that a fact question had appropriately been raised with respect to Huttinger violations of 18 U.S.C § 664 when used as a RICO predicate act. The Court found as follows:

> "We find that a fact issue exists as to whether Huttinger breached any of the fiduciary duties imposed by 29 U.S.C. § 501(a). As we state, *supra*, 'intentional breaches of special fiduciary duties imposed by other statutes . . . ' than 18 U.S.C. § 664 may give rise to liability under 18 U.S.C. § 664."

See App. H 104a, and 105a, (slip op. at 3889).

REASONS FOR DENYING THE WRIT

In the first arguments submitted by ALPA and Huttinger, they contend that the federal labor policy precludes (or should preclude) the extension of RICO to union conduct. A gossamery approach is submitted to the Court seeking to make union activity and particularly the ALPA and Huttinger schemes and frauds exempt from the reach of RICO. But the history and clear wording of the RICO act, including but not limited to the prohibited *state and federal law* predicate acts impose upon union representatives and unions all of the intended effects of RICO.

Second, the ALPA and Huttinger argument seems to ignore the full extent of the findings of the Fifth Circuit with respect to there being genuine issues of material fact requiring trial on the merits. The RICO claims against ALPA in other cases can be considered by the Court in deciding whether there is a substantial likelihood of

future RICO violations where ALPA is the enterprise and/or a RICO defendant.

Third, the law between the parties in this case, the contract establishing the ERISA plan, unambiguously establishes the effective date and should be honored by the parties and this Court in the imposition of fiduciary obligations upon the plan fiduciaries. The claim that fiduciaries to a plan should be exempt from liability because they might create an argument that the establishment date is a time other than that agreed upon by them is clearly incongruent with the intent of the ERISA mandates. This is particularly the case where the Letter Agreement of 1982 creating contributions, establishing the plan participants and creating the trust for the required contributions began at the time which is later selected by the plan fiduciaries as the establishment date.

This foregoing summary is addressed in detail below.

I. WHERE THERE IS NO RATIFIED AGREEMENT, AND THE COLLECTIVE BARGAINING PROCESS PROMISES THE RIGHT OF RATIFICATION, BUT THEN THE EMPLOYER AND UNION REPRESENTATIVE MISREPRESENT TO THE EMPLOYEES THAT THEY HAVE NO CHOICE BUT TO ACCEPT TERMINATION, ARE THE ACTS OF MAIL FRAUD, WIRE FRAUD AND BREACHES OF FIDUCIARY DUTIES OF THE EMPLOYER AND UNION SUBJECT TO RICO, ERISA AND BREACHES OF DUTY OF FAIR REPRESENTATION ("DFR") ACTIONS?

A. ALPA and Huttinger argue that the ERISA and DFR breaches in this case should not serve as grounds for broader base of relief under the RICO act.

The factual history of this case makes practically inapplicable the petitioners' argument regarding the

scope and objectives of the RLA. There is no doubt that the dispute resolution apparatus created by the RLA is only appropriate to ongoing disputes between existing management and labor. Such black letter law needs no citation and is clearly intended to protect the flow of commerce from interruption.

The facts of this case do not present an ongoing labor dispute, however. Instead, by virtue of misrepresenting the rights of the airline pilots and advising them that they had no choice but to accept termination, where they had previously been assured of the right to vote for or against the *proposed* Pilots Agreement of July 24, 1985, the employer and the union very clearly breached their duties under the RLA for the purpose of allowing the employer to move its base to El Salvador and for the union to eliminate its exposure for acts of sabotage promoted by it against employer aircraft.

Where such misrepresentation serves as the fulcrum to achieve previously enjoined objectives, the entire purpose of collective bargaining is effectively subsumed by a slight of hand.[5]

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[5] After TACA and ALPA executed the July 24, 1985 Pilots Agreement, the ALPA representative assured the pilots of a right to vote on the agreement. Approximately one week later, on August 3, 1985, TACA advised the pilots that they must choose in twelve (12) days either severance pay and retirement benefits, or move to El Salvador to work for TACA. The ALPA representative then represented to the pilots that they had no choice but to accept the TACA offer of August 3, 1985. Based on these misrepresentations, all of the United States pilots chose the severance offered by TACA. This implicitly gave

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Next the ALPA and Huttinger brief seems to argue that the federal labor law prohibits the application of RICO to these defendants. It goes on to argue that because this Court in the matter of *DelCostello v. International Board of Teamsters*, 462 U.S. 151 (1983) adopted a NLRA six month statute of limitation for DelCostello – type hybrid claims, these defendants should not be required to respond to RICO. As demonstrated most recently by this Court's analysis of *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, et al*, U.S.C 88-1719 (March 20, 1990), and more extensively argued in the Cross Petition for Writ of Certiorari filed in this Court on July 26, 1990, the present claim is not a uniform DelCostello – type claim. But more importantly, exposure of the defendants under RICO does not preclude their exposure under the DFR claim or vice-versa. And the defendants cite no authority to the contrary.

Unions have repeatedly been made the object of RICO cases to remedy and constrain further state and federal law violations as proscribed by the list of RICO predicate acts.[6]

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effect to the Pilots Agreement of July 24, 1985 which provided that ALPA was to no longer represent the TACA pilots after August 31, 1985, all in violation of the judicially prescribed methods regulating the termination of collective bargaining representation and the provisions of 29 U.S.C. § 159(a) & (b).

[6] In particular the Court is referred to the RICO case against the teamsters which is reported on pursuant to the order of Judge David Edelstein (U.S.D.C., S.D.N.Y.) in the July issue of the *International Teamster*, a union publication.

(Continued on following page)

The further argument of ALPA and Huttinger that the Fifth Circuit Court of Appeals seeks to allow this claim to go forward solely on the basis of state law and RICO being a mere procedural vehicle for the application of state law ignores the avenues for relief clearly relied upon by the Court of Appeal. The RICO predicate acts envisioned by Congress in this and similar cases include prohibited labor conduct making untenable any claim that Congress did not intend RICO to reach to prohibited labor conduct.[7] 18 U.S.C. § 1961.

The further argument by ALPA and Huttinger that ALPA should not be required to respond for Huttinger's mail fraud and other breaches of his fiduciary duties completely ignores the distinction made by the Fifth Circuit in its findings relative to 18 U.S.C. § 1962(b) and its application of the case law of *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1307 (7th Cir. 1987), cert. denied ___ U.S. ___, 109 S.Ct. 3241, 106 L.Ed.2d 588 (1989) as distinguished from any restriction of vicarious liability under the association in fact enterprise as outlined in 18 U.S.C § 1962(c). The clear legal basis for the findings of the Fifth Circuit in this regard require no argument.

Because the argument under both sections IA and IC of the Petition for a Writ of Certiorari deal with the extent

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Also see the most recently decided case of *United States of America v. Local 30, United Slate, Tile and Composition Roofers, et al*, 686 F.S. 1139 (E.D.Pa. 1988), appeal dismissed at 871 F.S. 401, (1st Cir.1989), certiorari denied 110 S.Ct. 363.

[7] See for instance 18 U.S.C. § 664, 18 U.S.C. § 1951, 18 U.S.C. § 1954, 29 U.S.C. § 186, 29 U.S.C. § 501.

of RICO, the latter will be addressed next rather than subsection IB relating to ERISA, which is addressed in section IV.

B. ALPA and Huttinger argue that Congress did not intend to criminalize labor conduct by enacting RICO.

Although admitting that several labor law prohibitions are included within predicate RICO acts, see footnote 15 on page 18 of the original Petition for Issuance of a Writ of Certiorari, ALPA and Huttinger argue that Congress could not have intended to regulate labor activity by the application of other criminal statutes available under RICO.

For instance, they argue that mail fraud should not be subject to RICO constraints where it is committed in connection with a DFR breach. It is respectfully suggested to the Court that the very activity which our government seeks to prohibit in unions through Court imposed trusteeships and decreeships[8] are clear evidence of the intent of Congress and should continue to be available in this Court and the lower courts.

Further argument by ALPA and Huttinger that the underlying procedural requirements of each predicate criminal statute must be satisfied prior to invoking RICO relief (as shown particularly in Footnote 16 on pages 19 and 20 of the original brief for issuance of the writ) would make impossible the general application of the RICO statute.

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[8] See for example the cases discussed in Footnote 5 above.

The argument of ALPA and Huttinger relative to 18 U.S.C. § 664 appears to be an overlybroad mischaracterization of the relatively narrow finding of the Fifth Circuit that this issue should be returned to the trial court for resolution of disputed issues of fact. The Court of Appeals' clarification offered in the response to the application for rehearing should eliminate questions in this regard.[9]

In trying to avoid the application of the breath of prohibited activity under 18 U.S.C. § 664, ALPA and Huttinger argue that the Court should ignore the reliance by the Fifth Circuit on the traditional meanings of conversion and embezzlement dealt with extensively in *United States v. Andreen*, 628 F.2d 1236 (9th Cir. 1980), relying on *Morissette v. United States*, 342 U.S. 246, 272, 72 S.Ct. 240, 254, 96 L.Ed. 288 (1952).

In this case ALPA was to establish the pension plan for the benefit of the airline pilots. There is nothing new about conversion or the definition relied upon by the Fifth Circuit. Unauthorized use of property of another (e.g. the ALPA pension plan) is alleged by the pilots and recognized by the Fifth Circuit to be a predicate RICO act. The language of 18 U.S.C. § 664 is broad and encompasses many potential breaches of fiduciary duties under the concept of conversion. The argument of ALPA and Huttinger ignores these general principles and seeks to approach the absence of evidence by the defendants that Huttinger acted in any way other than willfully, as a failure of proof by the airline pilots. In fact, there is a failure of ALPA and Huttinger to oppose the facts (which

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[9] Please see App. H 104a and 105a (slip op. at 3889) and p. 4 above.

are to be presumed true) as shown in the pilots complaint.

Further argument that illegal union activity may be found to be in violation of the underlying statute (e.g. 18 U.S.C. § 664) *and* RICO should not restrict the full application of the law to such criminal activity. The same acts may also be prohibited by ERISA and/or other civil statutory law but the remedies available under one statute are not a basis to exclude RICO remedies.

II. ARE THERE GENUINE ISSUES OF MATERIAL FACT REQUIRING TRIAL ON THE MERITS WHERE NUMEROUS PREDICATE ACTS HAVE BEEN SHOWN IN THIS AND SIMILARLY SITUATED PILOTS' CLAIMS AGAINST ALPA?

A pattern of racketeering activity was found to be sufficiently alleged and genuine issues of material fact were found to exist to require that the Fifth Circuit reverse the findings of the lower Court when applying the relatively recent clarifications of the definition of pattern of RICO activity as established in *H. J., Inc. vs. Northwestern Bell Telephone Co.*, 492 U.S. ___, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989).

The Fifth Circuit examined the facts under *H.J., Inc.*, supra, and established the existence of facts sufficient to show the continuity of the predicate acts or offenses and the relationship between these acts or offenses.

Looking to the findings of the Fifth Circuit under the "ALPA as Enterprise Persons" (at App. A, 42A – 44A) and the continuity established in the clear relationship among the predicate RICO acts (at App. A, 58A – 59A) the Court

of Appeals shows that under the provisions of 18 U.S.C. § 1962(b) ALPA is a clear continuing threat of harm to similarly situated victims; and, that ALPA, individually and on behalf of Huttinger, has failed to respond to the allegation that ALPA sold out the TACA pilots to avoid prosecution for acts of sabotage committed by Pagent at Huttinger's direction. Likewise, Huttinger's prior exclusive receipt of retirement benefits, and his continuing to receive retirement benefits, show the ongoing nature of the continuing harm to these victims.

Although *all* DFR actions will not also sound in RICO, the existence of such DFR and RICO claims in this case warrant a trial on the merits. There is no explanation for the actions of ALPA and Huttinger in seeking to implicitly terminate the retirement contributions of TACA, where less than thirty (30) days before, they indicate to the TACA pilots that they refused to consider tying the pension plan to the contract negotiations. This reversal in course without notice to the pilots, without allowing the promised ratification, through misrepresentation and deception operated to benefit only ALPA and Huttinger. Clearly, these actions continue to deprive eligible pilots of their pension benefits and will continue to do so in the future.

Similar allegations of wrongdoing in DFR actions against ALPA have been lodged by other pilots and groups of pilots.[10] The duties owed by ALPA are being

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[10] Although these actions were not filed as RICO claims, in some cases they could have been and may be in the future. The ongoing nature of claims of misrepresentation and the need

(Continued on following page)

regularly breached according to the claims of various pilots and pilot groups. Recognizing a substantial likelihood of future RICO violations as a matter of other factual occurrences, whether characterized as RICO claims or DFR claims, shows the need for judicial scrutiny and the need for this Court to allow to these plaintiff pilots their right to trial on the merits – with jury consideration of the factual questions arising out of the conduct of ALPA and Huttinger, and their apparent motives.

If, however, this Court elects to examine the RICO issues in response to the Petition for Writ of Certiorari filed by ALPA and Huttinger, it is respectfully suggested that this Court consider the findings of the Fifth Circuit with respect to the predicate RICO act allegations under 29 U.S.C. § 186. The allegation of the pilots that there were illegal payments to Huttinger is circumvented by the Fifth Circuit concluding that the prohibited criminal activity does not apply to ALPA, although ALPA is neither RLA employer nor employee. See 29 U.S.C. § 152(2) and (3). The relied upon LMRA exclusion of coverage of

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for pilots to be protected from ALPA appear very clearly from these cases. See *E. G. O'Neil, et al v. ALPA*, 886 F.2d 1438 (5th Cir. 1989) (alleging misrepresentation of the right to ratify a settlement agreement and similar arbitrary and irrational actions of ALPA); *Bernard v. ALPA*, 873 F.2d 219 (9th Cir. 1989) (finding a blatant refusal to represent pilots and enjoining the proposed ALPA agreement); *Barthelemy v. ALPA*, 897 F.2d 999 (9th Cir. 1990); *Burkevich v. ALPA*, 894 F.2d 346 (9th Cir. 1990); *Haerum, et al v. ALPA*, 892 F.2d 216 (2nd Cir. 1989); and, *Equal Employment Opportunity Commission v. ALPA*, 661 F.2d 90 (8th Cir. 1981).

RLA employers and employees is respectfully suggested to be inapplicable to claims which are filed after the alleged September 1, 1985 effective date of the Pilots' Agreement. If the Pilots' Agreement is found to become effective and relieve TACA, Huttinger and ALPA of exposure under the RLA for acts before September 1, 1985, it must likewise relieve the pilots of the restrictions of RLA for acts before September 1, 1985.

III. WHETHER THE LAW BETWEEN THE PARTIES – THE CONTRACT – ESTABLISHING AN EFFECTIVE DATE FOR THE ERISA PLAN NEED BE HONORED BY THE PARTIES AND THE COURT IN ITS IMPOSITION OF FIDUCIARY OBLIGATIONS ON THE PLAN FIDUCIARIES?

The argument of ALPA and Huttinger that no plan was established ignores the fact that a plan *was established* and that by contract the parties to the plan also established the *effective date* of the plan.

Arguments that fiduciary duties should not be imposed upon plan fiduciaries where no plan has been established seem to clearly ignore the distinction drawn by the Fifth Circuit between *if* a plan has been established and *when* a plan has been established. Here the source of financing and the beneficiaries of that finance were clearly established in the Letter Agreement of February 2, 1982. The amount of the defined contributions was established and the plan was subsequently contractually established as of February 1, 1982.

Those persons parties to the retirement plan and trust contractually recognized as follows:

> "Establishment and name of the plan and trust – TACA International Airlines S.A., (hereinafter referred to as the Company), on February 1, 1982, established a pension plan for its pilots, which as it may be amended from time to time is known as the TACA International S.A. Pilots Retirement Plan and Trust."

Thereafter in Article two of the plan, the effective date is defined as follows:

> "The term 'effective date' means February 1, 1982, the date on which the provisions of this plan are effective."

It seems very clear that the intent of the parties to the *established plan* was to make it *effective* on February 1, 1982. The defendants arguments to the contrary, denying the clear words of the plan, particularly where supported by the actions of the parties beginning on the effective date pursuant to the Letter of Agreement, do not support relieving them of their fiduciary obligations under the plan.

Reversing the earlier determinations of the trial court that no plan was established when actions of the parties and plan documentation clearly show to the contrary, the Fifth Circuit remanded for trial on the merits.

Any issues of fact regarding ERISA obligations and the time when such fiduciary obligations begin according to the plan and applicable law are properly left to the trier of fact for resolution.

IV. APPLICATION OF STATE COMMON LAW TO MATTERS RELATED TO UNION RETIREMENT PLAN.

In section IB of the ALPA and Huttinger brief, an argument is made that ERISA pre-empts RICO. No support for this proposition has been cited.

Instead, ALPA and Huttinger contend that the Court of Appeals relied upon state law to find that mail fraud had occurred. However, a plain reading of the Fifth Circuit Opinion at App. H, p. 48a and 49a shows that the Court of Appeals relied upon 18 U.S.C. § 1341, Frauds and Swindles and the interpretation of that statute.

Furthermore, ALPA and Huttinger ignore the fact that the ERISA pre-emption does not apply to any law of the United States – e.g., RICO.

As pointed out by this Court in *Shaw, et al., v. Delta Airlines, Inc., et al.*, 463 U.S. 85, at p. 91.:

> "Section 514 (a) of ERISA, 29 U.S.C. § 1144(a), pre-empts 'any and all State laws insofar as they may now or hereafter relate to any employee benefit plan' covered by ERISA. State laws regulating insurance, banking, or securities are exempt from this pre-emption provision, as are generally applicable state criminal laws. § 514 (b)(2)(A) and (b)(4) of 29 U.S.C. § 1144(b)(2)(A) and (b)(4). Section 514(d), 29 U.S.C. § 1144(d), moreover, provides that '[n]othing in the title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law.' "

Assuming therefore that the Court of Appeals had relied on state criminal laws to support the RICO claim, such "generally applicable state criminal laws" *Shaw, supra*, 463 U.S. 91, are exempt from pre-emption by ERISA. But more particularly their inclusion as predicate acts under RICO – a federal law of the United States – is also exempt from pre-emption by ERISA.

CONCLUSION

Considering the foregoing, it should be clear to this Court that the Fifth Circuit followed the law as interpreted by this Court in ordering the return of this case for trial on the merits.

Accordingly, the Petition for Issuance of a Writ of Certiorari should be denied.

Respectfully submitted,

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§ 152. Definitions

When used in this subchapter –

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

§ 1961. Definitions

As used in this chapter –

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relative to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the

prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Noting in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.